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In the Supreme Court of the United States

OCTOBER TERM, 1975

EMSLIE LEANDER MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the affidavit supporting the search warrant was inadequate to establish probable cause and that the district court should have conducted an evidentiary hearing to explore his allegations that there were misrepresentations in the affidavit.

Following a jury-waived trial in the United States District Court for the Southern District of California, petitioner was convicted of concealment of stolen government property and of conspiracy to commit the substantive offense, in violation of 18 U.S.C. 371 and 641. He was sentenced to concurrent terms of five years' imprisonment on each count and was fined $10,000. The court of appeals affirmed in a thorough opinion upon which we rely (Pet. App. 14-17; 522 F. 2d 1068).

The evidence, which is summarized in the opinion of the court of appeals, showed that between 1971 and 1973 petitioner, then a Navy enlisted man, removed large quantities of new hand tools from a Navy supply facility. This venture had the cooperation of Charles Heckler, the facility's assistant manager. On March 9, 1973, agents of the Federal Bureau of Investigation executed a search warrant for petitioner's premises and for a Ford van owned by petitioner. Numerous government hand tools and various wrappings and tapes, later identified as the types of materials carried by or used at the facility, were seized (Tr. 323-327).[1] Several boxes and containers seized bore the notations of an employee of the facility (Tr. 323-327).

Prior to trial petitioner filed motions seeking disclosure of the identity of the informant referred to in the affidavit supporting the search warrant and seeking to suppress the evidence seized. Petitioner asserted that he believed the informant to be Glen Wachhold. If Wachhold was the informant, petitioner argued, he would be able to show that the affidavit contained a substantial misrepresentation of Wachhold's story (M. Tr. 14).

The district court conducted an *in camera* hearing, during which agents testified concerning the informant's identity, the basis for questioned portions of the affidavit, and the basis for the government's position that the informant's personal safety would be jeopardized if his identity were disclosed. The district court concluded that disclosure of the informant's identity would not be of benefit to petitioner (Pet. App. 15-16).

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[1] "Tr." and "M. Tr." refer respectively to the transcript of the proceedings at the trial of petitioner's co-defendants, which was submitted as evidence at petitioner's trial, and to the transcript of the proceedings on petitioner's pretrial motions.

1. The affidavit in support of the warrant stated that a confidential source who had provided reliable information on more than five prior occasions told Special Agent Robert Gray that petitioner had been stealing tools, some of which the informant had purchased (Pet. App. 19). The affidavit also stated that a confidential source "who ha[d] provided reliable information on theft of government property on two previous occasions" had told another agent that on February 23 or 24, 1973, he had observed government tools in petitioner's home and garage (Pet. App. 21). The affidavit recited that this informant and two agents had purchased tools from petitioner's confederates, that the informant had observed the conspirators selling such tools to others, and that each tool purchased by the agents bore a unique government symbol (Pet. App. 20-21).

Petitioner contends that this affidavit failed to establish probable cause because it did not state that the affiant had personal knowledge that the confidential source had furnished reliable information in the past, and because the affiant did not specify the circumstances under which the affiant had received the information. However, as the court of appeals noted (Pet. App. 16), the affidavit established "that the informer had given reliable information in the past and that his reports to FBI agents were based either on his personal observations or his personal purchases from the conspirators." The requirements of *Aguilar* v. *Texas*, 378 U.S. 108, 114-115, were thus satisfied.

Moreover, as the court of appeals observed, the affidavit also contained numerous independent facts, including those furnished by two agents, that corroborated the informant's statements. See *United States* v. *Harris*, 403 U.S. 573; *Spinelli* v. *United States*, 393 U.S. 410, 415-416. Petitioner's attempt to flyspeck the affidavit was properly rejected by the court of appeals; "[a] policeman's affidavit should not

be judged as an entry in an essay contest" (*Spinelli, supra,* 393 U.S. at 438; Fortas, J., dissenting).

2. Petitioner also contends that the district court should have held a hearing on his challenge to the truthfulness of the assertions in the affidavit because Wachhold—whom petitioner asserts was the informant—told petitioner's counsel a story different from the version of affairs recounted in the affidavit. However, as the court of appeals held, these allegations did not approach "the 'substantial showing of falsehood' that is required" (Pet. App. 16). The district court properly held an *in camera* hearing and concluded that an open hearing would not be of benefit to petitioner. The court of appeals examined the sealed transcript of the *in camera* hearing and approved the district court's decision (Pet. App. 16).

Petitioner contends that there is a conflict among the circuits concerning the effect of misrepresentations in an affidavit, and concerning the initial showing necessary to require a district court to hold a more thorough hearing. See *United States* v. *Belculfine,* 508 F. 2d 58 (C.A. 1) (collecting cases); *United States* v. *Dunnings,* 425 F. 2d 836, 840 (C.A. 2), certiorari denied, 397 U.S. 1002 (requiring an "initial showing of falsehood or other imposition on the magistrate"); *United States* v. *Carmichael,* 489 F. 2d 983, 988 (C.A. 7) (requiring an initial showing of a misrepresentation of a "material fact" or any intentional misrepresentation). Cf. *North Carolina* v. *Wrenn,* 417 U.S. 973 (White, J., dissenting from denial of certiorari). Although resolution of these conflicts eventually may be necessary in a case properly presenting one or both of the issues, this is not such a case. Here, not only was petitioner's initial "showing" of falsehood no more than speculation (and therefore insufficient under any standard), but also the district court held a hearing to inquire into the claimed falsehood and concluded that the disclosure

of the informant's identity would not be of aid to petitioner (Pet. App. 16).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.